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No. 96-1820

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

H. JASON GOLD, in his Capacity as Chapter 7 Trustee for Guy R. Detrick, GORDON P. PEYTON, in his Capacity as Chapter 7 Trustee for Donna Detrick, and FAST FORWARD, INC.,

Petitioners,

—v.—

PANALPINA, INC., PANALPINA AIRFREIGHT, INC., MULTI-MODAL FREIGHT SYSTEMS, INC., MULTI-MODAL FREIGHT SYSTEMS OF VIRGINIA, and SYLVAN FRIEDMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Preliminary Statement

Petitioners H. Jason Gold, in his capacity as Chapter 7 Trustee for Guy R. Detrick, Gordon P. Peyton, in his capacity as Chapter 7 Trustee for Donna Detrick, and Fast Forward, Inc., submit this reply brief in further support of their petition for a writ of certiorari (the "Petition") to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on March 18, 1997.

After the filing of the Petition in this case on May 19, 1997, the Court handed down its decision in *Klehr v. A.O. Smith Corp.*, ___ U.S. ___, No. 96-663 (decided June 19, 1997). In *Klehr*, the Court rejected the "last predicate act" rule—the only rule that would have rendered petitioners' claims timely there—as a rule of accrual for civil actions under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). *Klehr* at 5-10.[1] The seven member majority of the Court declined, however, to resolve the long-standing conflict among the courts of appeals regarding the proper accrual rule for RICO claims. *Id.* at 10. Having first reviewed the somewhat strained application of the legal principles at issue to the facts of *Klehr*, Justice Breyer wrote for the Court:

> In these circumstances, we believe we should not consider differences among the various discovery accrual rules used by the Circuits. The legal questions involved may be subtle and difficult. Compare [*Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 239 (8th Cir. 1996)] (claim accrues with discovery of existence *and source* of injury, plus pattern) with [*Bivens Gardens Office Bldg. Barnett Bank*, 906 F.2d 1546, 1554 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991)] (claim accrues with discovery of injury and pattern); *see also* [*Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 1991)] (describing differences among various discovery rules and doctrines of "equitable tolling" and "equitable estoppel"). And the facts of this case do not force focused argument as to how the traditional Clayton Act "injury" accrual

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[1] Citations to *Klehr* are to the pages of the Bench Opinion handed down on the day of decision.

> rule, principles of equitable tolling, and doctrines of equitable estoppel should interact in circumstances where the application of one, or another, of these different legal doctrines would make a significant legal difference. * * * We shall, at the very least, wait for a case that clearly presents these, or related issues, providing an opportunity for full argument, before we attempt to resolve them. *Id.* at 12 (emphasis added).

This is that case. Contrary to the assertions advanced by respondents in their Brief in Opposition ("Br. Opp."), this case "force[s] focused argument" on the principal conflicts among the courts of appeals—whether the discovery of injury alone, existence *and source* of injury, or injury and pattern, constitutes the proper RICO accrual rule. Under the first rule, petitioners' RICO claims are time-barred, while under either of the latter two rules the racketeering claims here may proceed to trial on remand to the district court.[2]

II. The State Of The Record In This Court

Respondents fail to address the substance of the Petition in their opposition; they fail to show why the Court should not review this case and why it is not an appropriate vehicle to address the "subtle and difficult" issues of RICO claim accrual. Instead, purporting to invoke Supreme Court Rule 15.2, respondents would have the Court believe that Petitioners have sought to mislead the Court as to the facts, and that, as a result, the case is not suited for review here. (Br. Opp. at 9-10, 14 n.8). This attempt to deflect attention from the very serious

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[2] Petitioners discovered the "pattern" of RICO predicate acts shortly after discovery of the source of their injury. *See* Petition at 8.

charges petitioners have made and from the very serious and concrete issues this case raises, however, is unavailing.

Contrary to respondents' assertions, the opinion of the Fourth Circuit speaks for itself, resolving this alleged "dispute" over the state of the record in this Court unequivocally in petitioners' favor. The Fourth Circuit found the record more than adequate to demonstrate that petitioners had stated a valid claim under RICO, that they had been injured by respondents' racketeering scheme, and that the racketeering injury sustained was serious and consequential, involving, as it did, fraud on the United States and foreign governments, the perversion to criminal ends of an important United States foreign policy program (the Foreign Military Sales Program), and proven criminal wrongdoing for which one respondent stood convicted and for which another today stands under indictment. The more significant facts found and articulated by the Fourth Circuit in its opinion include those quoted below.[3]

> —Facts discovered since 1991 show that in 1988, Friedman and Multi-Modal, acting together with agents of Daniel F. Young, Inc. . . . devised a 'rebilling' scheme to defraud the United States and foreign governments participating in the [Foreign Military Sales Program]. (App. 10a, n.4)

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[3] This case comes before the Court following the district court's granting of respondents' motion for summary judgment on the bar of the statute of limitations, and the court of appeals affirmance of that order. Consequently, the record before the Court consists not of trial proceedings, but rather of the affidavits, deposition testimony, and pleadings on the summary judgment motion. *See* Fed. R. Civ. P. 56(c). In this procedural posture, the facts—and the inferences to be drawn from those facts—must be viewed "in the light most favorable" to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

> —In the Spring of 1989, Friedman solicited Panalpina to join the rebilling scheme conspiracy, and the scheme expanded. (*Id.*)
>
> —Thereafter, Friedman wanted Multi-Modal to receive more of the ill-gotten gains, and hence, decided that if Friedman could assume control of the warehouse operation presently operated by the Detricks, Friedman would be able to increase the amount of proceeds from the rebilling scheme. As a result, Friedman devised a plan to force the Detricks out of business by subsidizing below-competition rates and paying 'kickbacks' to various Panalpina employees. (App. 10a-11a, n.4)
>
> —[a]ll Panalpina's officers and employees who were involved in the rebilling scheme have invoked their Fifth Amendment privileges against self-incrimination. (*Id.*)
>
> —Some time [after the Detricks' cooperation with federal law enforcement], Friedman entered a guilty plea on criminal charges relating to the rebilling conspiracy and employees of D.F. Young were convicted at trial with respect to the rebilling scheme. The investigation of Panalpina and its officers, agents, and employees continues. (*Id.* 11a, n.5)

The facts of this case, then, present a paradigm of the course and development of a civil racketeering claim. They cogently force attention to the issue of RICO claim accrual, and illuminate the various accrual rules that have been adopted by and which now divide the courts of appeals. This case is the correct vehicle to resolve the long-standing conflicts that the Court, in this last Term, declined to resolve.

III. The Reasons For Granting The Writ Stand Unrefuted Before This Court

Respondents' legal arguments are equally misleading. Respondents' principal argument—that the RICO claims here are substantively deficient (Br. Opp. at 11-14)—is merely an attempt to create a phantom factual dispute on a wholly collateral issue. Both the district court and the Fourth Circuit correctly held that petitioners had stated a claim for relief under RICO. The central issue decided by the Fourth Circuit, and the *only* issue to be reviewed in this Court, is the appropriate RICO accrual rule; the Fourth Circuit panel was constrained to apply its circuit's "injury discovery" rule, while this Court must determine which rule is the correct one. As demonstrated in the Petition, the facts of this case inexorably compel an answer to that question. Respondents' primary argument is irrelevant to the application for certiorari.

Moreover, respondents' three-page factual recitation allegedly showing the deficiency of petitioners' claims is merely an inappropriate endeavor to have this Court decide a matter—the facts relevant to the legal issue of timeliness—developed in the district court and confirmed by the court of appeals, and that the Court should not and need not decide. As made clear in the court of appeals opinion, petitioners' allegations and proofs are plainly sufficient to present a valid RICO claim under section 1962(a) for respondents' use of racketeering proceeds to injure petitioners in their business. *See* App. at 9a-11a and nn.3-5.[4] In short,

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[4] As the Fourth Circuit's opinion plainly discloses, and contrary to respondents' contentions (Br. Opp. at 11-13), petitioners' Section 1962(a) RICO claims also fully satisfy the applicable standard of loss causation. *See Busby v. Crown Supply, Inc.*, 896 F.2d 833, 838 (4th Cir. 1990) (Section 1962(a) claim lies when a plaintiff is "injured *in the process* of the [RICO enterprise's] receipt and use of the illegally obtained income." (emphasis in original)).

in the present posture of this case the substantive validity of petitioners' RICO claims is neither subject to dispute nor properly before the Court.[5]

Respondents' secondary argument rests upon the contention that petitioners did not press, as they do here, for the application in the lower courts of the accrual rule enunciated in *United States v. Kubrick*, 444 U.S. 111 (1979). (Br. Opp. at 14-16).[6] This argument is frivolous in the extreme. Petitioners were constrained by governing precedent in the Fourth Circuit, which applies the pure "injury discovery" accrual rule, and accordingly urged that the rule required knowledge of *more* than discovery of "mere economic loss." (App. at 18a-19a) For petitioners to have urged the Fourth Circuit panel to reject its accrual rule would have been an exercise in futility, as the settled rule in the Fourth Circuit, as in most circuits, is that only the entire court may overrule a decision of a prior panel. *Brubaker v. City of Richmond*, 943 F.2d 1363, 1381-82 (4th Cir. 1991).[7]

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[5] The Court similarly declined the invitation to reexamine the independent factual conclusions of the two lower courts in *Klehr*, particularly because the alleged error was beyond the scope of the questions presented on certiorari. *Klehr* at 12-13, 15. The questions presented in the Petition here are likewise purely legal questions addressing only the appropriate RICO accrual standard.

[6] Contrary to respondents' contention (Br. Opp. at 9), petitioners *never* asserted that they cited *Kubrick* to the lower courts. The phrase petitioners used—"As petitioners *urge* below," (Petition at 10)—is in the present tense and clearly refers to the *argument* that follows, not to the proceedings in the lower courts, a reference that would have required the use of the *past* tense.

[7] In recognition of this principle, petitioners stated in their brief below:

> Appellants recognize that even if this Court were inclined to alter the rule in [*Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987)], it cannot "overrule a prior panel of this circuit." *Brubaker v. City of Richmond*, 943

(continued...)

Moreover, the very authorities respondents cite make abundantly clear that only an *issue*, not a particular *precedent*, must be pressed or passed on in the lower courts in order to preserve it for review in this Court.[8] The *issue* before the Fourth Circuit in this case was whether petitioners' claims were timely under the RICO accrual rule applied in the Fourth Circuit. That, at bottom, is the same issue presented here, with the difference that in this Court petitioners are free to urge that the Court should adopt a rule that, however applied, will render their claims timely.

Respondents next argue that even were the Court to apply the *Kubrick* rule, the outcome in this case would not change, because *Kubrick* purportedly "imposes on an injured plaintiff an affirmative duty to investigate the potential cause of his injury after he has discovered his loss or injury." (Br. Opp. at 16) The *Kubrick* rule does no such thing. It commences the running of the statute when the putative plaintiff learns "he has been hurt *and who has inflicted the injury*." 444 U.S. at 122 (emphasis added). Only *then* does the duty to investigate arise. As the court of appeals here found, petitioners were falsely told by respondents that legitimate competition had caused their

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[7] (...continued)

F.2d 1363, 1381-82 (4th Cir. 1991). . . . Should the panel of this Court hearing this appeal disagree with our analysis that the *Pocahontas* rule is a [rule] that requires something more than the existence of economic loss to trigger the running of the limitations period, we respectfully reserve the right to petition the Court for rehearing *en banc* to urge the adoption of a different accrual rule or to seek review in the United States Supreme Court of this difficult question that has divided the circuit courts.

[8] *See, e.g., United States v. Williams*, 504 U.S. 36, 41-42 (1992) ("It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law," citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8).

injury; they believed this until discovery of the respondents' racketeering scheme. *See* App. at 9a-11a and nn. 3-4.[9] Under either the *Kubrick* rule or the "pattern" rule, only the discovery of the unlawful scheme triggers the statute of limitations. Either rule renders petitioners' claims timely.

Finally, respondents argue that the *Kubrick* rule is inappropriate for RICO claims. (Br. Opp. at 19-21) This contention ignores and is belied by the precedents of four courts of appeals which require discovery of injury *and its source* as a component of their accrual rules. *See Caproni v. Prudential Securities Incorporated*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990), *rev. on other grounds*, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 354 n.1 (1991); and *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). Each of these cases enunciates a test which requires discovery of injury *and its source*, plus pattern. *See also Klehr* at 12 (discussing various accrual rules including "discovery of existence *and source* of injury, plus pattern" (emphasis in original)). The very conflict among the circuits which calls for review in this Court shows that four of the circuits have adopted a rule that not only incorporates the *Kubrick* rule, but adds an element that permits greater liberality of application. Contrary to the suggestion of respondents, the rule of accrual petitioners press is neither foreign to the RICO context nor alien to the rules that the courts of appeals have already applied to RICO accrual.

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[9] These findings by the court of appeal also undercut respondents' disingenuous factual contention that because petitioners' contract was with Panalpina and their injury consisted of the loss of the contract, petitioners knew the source of the injury when the loss occurred. (Br. Opp. at 18)

In the post-*Klehr* regime, a rule requiring discovery of injury and its source represents the appropriate middle ground between those circuits requiring discovery of injury alone and those requiring discovery of injury and its source, plus pattern. *See* Petition at 16-17. The *Kubrick* formulation is such a rule, and it should be adopted as the uniform standard for accrual of civil RICO claims. It advances the appropriate remedial purposes of RICO yet at the same time honors the policies of statutes of limitations of repose and diligence.

* * *

IV. Conclusion

For the various reasons set forth herein and in the Petition, this petition for a writ of certiorari should be in all respects granted.

Respectfully submitted,

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